

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: **FERGUSON, DANIEL** AAD NO. 12-002/F&WA
SUMMER FLOUNDER EXEMPTION CERTIFICATE/PERMIT 126 DENIAL

DECISION AND ORDER

This matter is before Hearing Officer David M. Spinella on the Applicant Daniel Ferguson's Motion for Summary Judgment filed February 13, 2013 and the Department of Environmental Management, Division of Fish and Wildlife's ("Division") Cross Motion for Summary Judgment filed February 25, 2013. The Motions were filed pursuant to Rule 8(A)(1) of the *Administrative Rules of Practice and Procedure of the Administrative Adjudication Division for Environmental Matters* and Rule 56 of the *Superior Court Rules of Civil Procedure*. On June 13, 2012 Applicant Daniel Ferguson filed an Appeal of the determination of the Division dated May 18, 2012 denying the Applicant an interest in Summer Flounder Exemption #126 that had been issued to the F/V Dan Mullins III. Each of the parties suggest there are no genuine issues of material fact and therefore have presented these Motions for Summary Judgment.

FACTS

The Applicant states in his Memorandum in Support of Summary Judgment that he entered a Purchase and Sales Agreement with the Cape Cod Commercial Hook Fisherman's Association ("CCCHFA") on March 20, 2009. In the March 20, 2009 Purchase and Sales Agreement, Applicant agreed to transfer the vessel, the Dan Mullins III. Along with the vessel, Applicant transferred two Northeast Federal Fishery Permits: Permit A, Northeast Federal Fishery Permit No. 150573, which is a Limited Access General Category IFQ scallop permit, and Permit B, Northeast Federal Fishery Permit No. 150573 is a limited access fishing rights and fishing permit history in the Northeast Multispecies, Summer Flounder, Black Sea Bass, Lobster and Scup.

Applicant argues that Permit A was separated from Permit B when Applicant applied for the Federal Limited Access General Category IFQ Scallop Permit. On March 20, 2009, the Applicant signed a Bill of Sale that transferred the vessel and federal permits mentioned in the agreement. Applicant argues that he did not intend to transfer his state fishing permits, specifically his Summer Flounder Exemption #126 for the State of Rhode Island in conjunction with his federal permits. In a letter dated March 20, 2009, signed by the Applicant and the CCCHFA, the U.S. Department of Commerce, National Marine Fisheries Services was notified of the transfer of the vessel and the permits. The Applicant then received a letter from the Rhode Island Department of Environmental Management ("RIDEM") dated May 18, 2012, stating that the state Summer Flounder Exemption #126 was transferred along with the federal permits. Applicant avers that the CCCHFA did not intend to acquire the Summer Flounder Exemption #126. Lastly, Applicant argues that although there is language in the Bill of Sale, dated March 20, 2009, stating that the state and federal permits were being transferred, Applicant was not aware of this language and did not intend to transfer the state permits, specifically, the Summer Flounder Exemption #126, as evidenced by the Purchase and Sales Agreement, dated March 20, 2009, which provides for only the transfer of the federal permits.

The Division takes the position that the May 18, 2012 denial letter was appropriately issued as the evidence submitted by the Applicant to RIDEM established that the Summer Flounder Exemption Certificate #126 had been sold to the CCCHFA pursuant to a notarized Bill of Sale. The Bill of Sale (Applicant's Exhibit B) stated in pertinent part:

"The F/V Dan Mullins III is sold and conveyed with ALL fishery permits, licenses and fishing catch history by Federal or State governments."

The Division relied on this notarized Bill of Sale and concluded that the Applicant divested himself of Summer Flounder Exemption Certificate #126 and therefore denied the

Applicant's interest in Exemption Certificate #126. The Division argues that the following sections of the *Rhode Island Marine Fisheries Statutes and Regulations* are controlling: Part VII Section 7.7.10(a) Change in Ownership; Section 7.7.10(b)(1) requiring the vessel owner to transfer a Certificate of Exemption only to another vessel fully owned by said vessel owner and Section 7.7.10(b)(2) which states that vessel permits (State and Federal) Certificate of Exemption and fishing history cannot be split.

Applicant argues that the Federal statute and State regulation are in conflict and therefore, Federal law preempts State law on this matter. Applicant cites 50 C.F.R. §648.4(a)(1)(i)(D) for the proposition that Federal and State permits can be split upon transfer.

CONSTITUTIONAL ISSUES

The Applicant argues that RIDEM's Rule 7.7.10(b)(2) is preempted by Federal Law and is therefore void. This Tribunal lacks jurisdiction to decide Constitutional issues and legislative intent. As stated in the case of *In Re: Advisory Opinion to Governor*, 627 A.2d 1246 (R.I. 1993), our Supreme Court succinctly said: "The statute is the source of agency authority as well as of its limits". The statute governing the Administrative Adjudication for Environmental Matters (RIGL §42-17.7-1) et seq. confers no powers on this Tribunal to decide Constitutional issues.

SUMMARY JUDGMENT

The Rhode Island Supreme Court held that "[s]ummary judgment is "a drastic remedy," and a motion for summary judgment should be dealt with cautiously. *Estate of Giuliano v. Giuliano*, 949 A.2d 386, 390-91 (R.I. 2008). Any request for summary judgment "must seek to establish that there exists no genuine dispute with respect to the material facts of the case. If the movant satisfies that requirement, the nonmovant must point to evidence showing that a genuine

dispute of material fact does exist.” *Id.*, See also *Benaski v. Weinberg*, 899 A.2d 628, 631-31 (R.I. 1998). A hearing justice who passes on a motion of summary judgment “must review the pleadings, affidavits, admissions, answers to interrogatories, and other appropriate evidence from a perspective most favorable to the party opposing the motion.” *Steinberg v. State*, 427 A.2d 338, 340 (R.I. 1981).

After reviewing the Applicant’s Motion for Summary Judgment and the Division’s Cross Motion for Summary Judgment, as well as the exhibits, it is clear that the Bill of Sale is the most relevant document for purposes of these Motions. The relevant language contained therein, “The F/V Dan Mullins III is sold and conveyed with ALL fishing permits, licenses and fishing catch history by Federal or State governments” is clear, unambiguous and undisputed by the parties.

I agree with the Division’s argument that the issue before me is not the ability to transfer federal permits and exemptions but rather the undisputed fact that the Applicant conveyed, in a notarized Bill of Sale, Summer Flounder Exemption Certificate #126. The Bill of Sale was signed by both Seller and Buyer on March 20, 2009 and notarized on March 20, 2009. It conveyed ALL fishing permits licenses and fishing catch history issued by federal or state governments. (Note: It is interesting that the parties capitalized the word “ALL” in the Bill of Sale) The most important fact which is also not disputed by the Parties is that the Bill of Sale is the only document that the Division was provided and relied on when making its determination dated May 18, 2012 to deny the Applicant’s application to transfer Summer Flounder Exemption #126. Based on the foregoing, I find that the Division reasonably concluded that the Applicant divested himself of Summer Flounder Exemption #126 and properly denied the Applicant’s interest in Exemption Certificate #126. Therefore, I find that there exists no genuine dispute with respect to the material facts of the case and sustain the Division’s Cross Motion for Summary Judgment and deny the Applicant’s Motion for Summary Judgment.

FINDINGS OF FACT

1. The Parties stipulated to the fact that on March 20, 2009, the Applicant signed a Bill of Sale (Applicant's Exhibit B) which conveyed "ALL" fishing permits, licenses and fishing catch history issued by Federal or State governments.
2. Applicant presented the Bill of Sale (Applicant's Exhibit B) to the Division in support of his application for a determination that he had an interest in Summer Flounder Exemption Certificate #126.
3. The Division reasonably relied upon the Applicant's Bill of Sale (Applicant's Exhibit B) which was notarized and conveyed "ALL" fishing permits, licenses and fishing catch history issued by Federal or State governments when it concluded that the Applicant divested himself of Summer Flounder Exemption Certificate # 126 and denied the Applicant's interest in Exemption Certificate #126.

CONCLUSIONS OF LAW

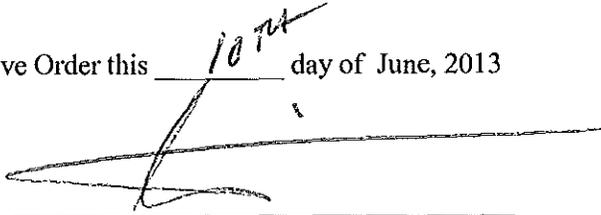
1. The Department of Environmental Management has personal and subject matter jurisdiction over the Applicant Daniel Ferguson and this matter.
2. The Applicant filed a timely appeal with the Administrative Adjudication Division on June 13, 2012 of the determination of the Division of Fish and Wildlife dated May 18, 2012.
3. There are no genuine issues of material fact that the Applicant conveyed his interest in Summer Flounder Exemption Certificate #126 in the Bill of Sale dated March 20, 2009. (Applicant's Exhibit B).
4. The determination of the Division of Fish and Wildlife dated May 18, 2012 denying the Applicant an interest in Summer Flounder Exemption #126 that had been issued to the F/V Dan Mullins III was legally correct and is upheld.
5. The Applicant's Motion for Summary Judgment is Denied and Dismissed.
6. The Division's Cross Motion for Summary Judgment is Granted and Sustained.

Wherefore, it is hereby:

ORDERED

1. The Applicant's Motion for Summary Judgment is **DENIED** and **DISMISSED**.
2. The Division's Cross Motion for Summary Judgment is **GRANTED** and **SUSTAINED**.
3. The Applicant's Appeal is hereby **DISMISSED**.

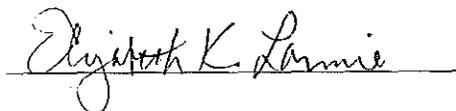
Entered as an Administrative Order this 10th day of June, 2013



David M. Spinella
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02906
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Robert J. Caron, Esquire, 4778A Broadway, Providence, RI 02909 and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 10th day of June, 2013.



NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI general Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

